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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1213

JOHN R. SANDERS,

Petitioner,

—v.—

JOHN G. BONOMI

(The Association of the Bar of the City of New York),

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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March 22, 1968

INDEX

PAGE

Preliminary Statement 1

Statement of the Case 2

ARGUMENT

I. The referee's conduct of the hearings in the circumstances presented was a reasonable exercise of his discretion 8

II. The Sixth Amendment right to a public trial is not applicable to disciplinary proceedings; the secrecy attendant to disciplinary proceedings is mandated for the protection of the accused attorney; and petitioner did not timely raise the point 17

CONCLUSION 18

APPENDIX—Referee's Report 19

TABLE OF CITATIONS

Ellis v. Dixon, et al., Members of the Board of Education of the City of Yonkers, 349 U. S. 458 18

Ex Parte Wall, 108 U. S. 265, 268 9

Lynch et al. v. N. Y. ex rel. Pearson, 293 U. S. 52 17-18

Matter of Ungar, 25 A. D. 2d 322, cert. den. 385 U. S. 1006 17

PAGE

Pointer v. Texas, 380 U. S. 400 10

Snyder v. Massachusetts, 291 U. S. 97 9

Willer v. Committee on Character and Fitness, 373 U. S. 96 9

OTHER AUTHORITY

United States Constitution, Sixth Amendment 17

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Preliminary Statement

This is a petition for a writ of certiorari to review an order of the Court of Appeals of the State of New York, entered on October 24, 1967, denying petitioner's motion for leave to appeal an order of the Appellate Division, First Judicial Department, entered June 29, 1967, disbarring him as an attorney and counselor-at-law admitted to practice in the State of New York, effective July 28, 1967.

Statement of the Case

Following the submission of a petition instituting charges of misconduct, and the filing of an answer thereto by petitioner, George Trosk, Esq., was appointed referee by order of the Appellate Division, First Department, entered March 18, 1965. A copy of that order with notice of entry was served upon petitioner on March 23, 1965 (Pet. Ex. 1; Min.* pp. 10-11). The referee thereafter communicated with counsel for respondent and suggested that hearings commence in June 1965, but was advised that this was not possible because one of respondent's witnesses, who resided in Washington, D. C., was then in the process of retiring from government service and could not obtain a leave of absence for the purpose of coming to New York to testify (Min. pp. 10-11). Although petitioner did contend the following September, while seeking an adjournment of the hearing then scheduled, that June hearings "would have been perfect for him" (Min. p. 11), he never communicated with either the referee or counsel for respondent to request a hearing at that time, much less to arrange for a specific date.

The petition for certiorari filed herein states (p. 8) that prior to June 1965, the referee granted respondent two adjournments because witnesses were ill. This is untrue and the page citation which petitioner cites in support thereof (Min. p. 59) clearly demonstrates that he is referring to events, later discussed herein, which actually took place after he obtained an adjournment of the hearing scheduled for September 15, 1965.

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* Min. references are to the transcript of the hearings before the referee.

On August 20, 1965, petitioner was served with a notice advising him that the hearing would be held on September 15, 1965, at 10 A.M. (Pet. Ex. 2; Min. pp. 2-3). On September 9, 1965, counsel for respondent wrote petitioner that witnesses coming from Washington, D. C., would be called to testify at the hearing scheduled for September 15, and that "In the circumstances, you will be expected to be ready to proceed" (Pet. Ex. 3; Min. pp. 4-5).

On September 13, 1965, petitioner telephoned counsel for respondent and requested an adjournment of the hearing scheduled for September 15, upon the ground that he was engaged on trial in a criminal case in the Supreme Court, New York County, and at the conclusion of that case he was committed to proceed to trial in another case pending in the same Court (Min. p. 5). Counsel for respondent advised petitioner that he had received more than one month's notice of the scheduled hearing; that witnesses were coming from Washington to testify; and that the hearings before the referee, in a matter pending in the Appellate Division, had precedence over cases pending in the Supreme Court (Min. pp. 6-7). Petitioner advised that he would submit an affidavit of actual engagement to the referee (Min. pp. 7-8). He did not do so (Report,* p. 4).

Although the hearing on September 15, 1965, was scheduled for 10 A.M., and petitioner had been so notified, he did not appear until 10:35 A.M. (Min. p. 11). He advised the referee that he had been delayed at a calendar call in the Civil Court, a court not only inferior to the Appellate Division, but to the Supreme Court as well (Min. p. 11).

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* The Referee's report is printed as an appendix to the petition. Somehow, many of its pages became reversed. Consequently, respondent is reprinting the report as an appendix hereto.

Petitioner thereupon requested the referee to adjourn the hearing upon the ground that he was actually on trial in the Supreme Court, New York County. The referee repeatedly advised petitioner (Min. pp. 16, 19, 24) that what he should have done was to adjourn his case in the Supreme Court on the ground that the Appellate Division proceeding was pending and took precedence. Petitioner having failed to even attempt to do so, the referee advised him that he would proceed to hear the witnesses who had come from Washington, D. C., and were then waiting outside the courtroom.

Petitioner then offered to bring these witnesses back at an adjourned date at his own expense (Min. p. 25) and, with the consent of the witnesses, the referee thereupon granted the adjournment (Min. pp. 35-41) to a date selected by petitioner, October 14, 1965 (Min. p. 38).

Subsequently, three scheduled hearings, including the one on October 14, 1965, were adjourned pending the recovery of one of the witnesses for respondent from injuries sustained in an accident. During this period, petitioner was given written notice of each scheduled date for a hearing and was, on each occasion, reminded of his undertaking to forward funds to the witnesses in Washington, D. C., to enable them to return to New York, on the basis of which he had obtained the adjournment of the September 15, 1965, hearing (Pet. Ex. 42; Min. pp. 147-50). Petitioner did not forward the funds. On February 23, 1966, counsel for respondent sent petitioner such a notice advising him that a hearing was scheduled to be held on March 3, 1966, and including, pursuant to the request of the referee, a direction that petitioner telephone the referee promptly upon receipt to confirm whether he had, in fact, forwarded

to the witnesses in Washington, D. C., the necessary monies for their expenses (Pet. Ex. 39; Min. pp. 144-5). Despite that direction, petitioner never communicated with the referee (Min. p. 154; Report, p. 5).

The witness having finally recovered, a hearing was scheduled to be held on May 4, 1966, at which respondent was prepared to proceed. On the day before, May 3, 1966, petitioner appeared before Judge Breitel (then a Justice of the Appellate Division, First Department) to present an order to show cause seeking an adjournment of the hearing scheduled for May 4, upon the ground that he was then actually engaged in a trial in the Federal District Court for the Southern District of New York (Min. p. 50). A conference was thereupon held between Judge Breitel, counsel for respondent and petitioner, at which it was agreed that the hearing would be adjourned to June 9, 1967, a date selected by petitioner (Min. p. 50), when it would go on without fail. Petitioner himself described the adjourned date as "ironclad" (Min. p. 50) and later conceded that it was clearly understood and agreed that the hearing before the referee would go on whether or not the case in the Federal Court had been included (Min. p. 53).

Stipulations confirming the arrangement made at the conference with Judge Breitel were mailed to petitioner on May 5, 1966, by certified mail. Although counsel for respondent advised petitioner on the following day that the certified letter contained the said stipulations, petitioner did not pick them up at the Post Office until May 24, 1966. He, thereafter, failed to sign the stipulation (Min. pp. 51-2; Report, p. 9).

On June 1, 1966, counsel for respondent forwarded a notice to petitioner reminding him that the hearing would

be held on June 9, 1966, whether or not the Federal Court case was still on trial in accordance with the agreement reached at the conference with Judge Breitel (Pet. Ex. 41; Min. pp. 146-7). Not having heard from petitioner, counsel for respondent contacted the witnesses in Washington, D. C., and arranged for them to come to New York for the hearing scheduled for June 9, 1966, forwarding the necessary funds inasmuch as petitioner had himself not done so as he had agreed to do on September 15, 1965, as a condition of the adjournment received on that date, and having failed to respond to communications with respect thereto.

On June 8, 1966, one day before the scheduled hearing, petitioner advised counsel for respondent that the Federal Court case was still continuing and that he, consequently, would have to ask to adjourn the scheduled hearing (Min. pp. 157-8). On June 9, 1966, the witnesses having once more arrived from Washington, D. C., petitioner appeared before the referee and personally requested that the hearing be adjourned.

In response to questions by the referee, petitioner conceded that he had made no request of the trial judge for permission to attend the disciplinary proceeding (Min. p. 53). He also disclosed that the trial judge had demonstrated, during the course of the trial, that he was prepared to recess for good cause, the trial having been delayed for a week to ten days due to deaths in the family of one of the jurors, illness of one of the defendants, illness of one of the jurors, and the death of the wife of one of the defense counsel (Min. pp. 48-9).

In these circumstances, the referee denied petitioner's request for an adjournment. Petitioner was advised that, if he did not remain during the taking of testimony, he

would be given the right to read the minutes when they were transcribed and have the witnesses recalled if he decided that he wished to cross-examine them (Min. p. 61). Petitioner thereupon left the hearing, stating that he was going to attend the Federal Court trial, and the testimony of the witnesses was taken. At the conclusion of the direct testimony, the referee instructed counsel for respondent to send petitioner a written notice as soon as the minutes had been transcribed and were available for his inspection (Min. p. 154).

By letter dated August 2, 1966, petitioner was advised that the minutes were available (Pet. Ex. 44; Min. pp. 161-2). Petitioner did not acknowledge the letter, or make any effort to inspect the minutes (Min. p. 163), later explaining that "I prepared myself otherwise" (Min. p. 215) and that he was familiar with the substance of the witnesses' testimony since they had testified at a preliminary hearing before the Committee on Grievances (Min. p. 161).

He subsequently decided to avail himself of the referee's offer to permit him to recall the witnesses in order to cross-examine them (Min. p. 235). Before proceeding to do so, petitioner stated for the record that by cross-examining the witnesses he was not waiving his objection to their direct testimony having been taken outside of his presence. When asked how he claimed he was prejudiced by not having been present during the direct testimony, petitioner replied that, due to his absence, he had been unable to object to any improper questions or to move to strike testimony, etc. The referee thereupon reminded petitioner that he had been repeatedly advised that he would be free to examine the transcript of the witnesses' testimony and to make any objections which he felt he might have made at

the time the testimony was taken. The referee thereupon inquired whether petitioner had availed himself of the opportunity to inspect the transcript and he replied that he had not (Min. pp. 263-4).

Petitioner then proceeded to cross-examine the witnesses. Cross-examination of respondent's principal witness, whose direct testimony took 51 pages of the transcript (Min. pp. 62-112), takes up 109 pages of the transcript (Min. pp. 266-374).

On March 23, 1967, the referee filed his report finding each of the four charges contained in the petition sustained. By order entered June 29, 1967, the Appellate Division, First Department, confirmed the report of the referee and disbarred petitioner, effective July 28, 1967.

ARGUMENT

I.

The referee's conduct of the hearings in the circumstances presented was a reasonable exercise of his discretion.

Although petitioner now contends, in an apparent effort to bring himself within the constitutional, statutory and case law citations contained in the petition for certiorari, that a disciplinary proceeding is a criminal case, he conceded that it was not in seeking leave to appeal to the Court of Appeals of the State of New York (App. Br. p. 15). This Court has, of course, held that disciplinary

proceedings are civil rather than criminal in nature, *Ex Parte Wall,* 108 U. S. 265, 288. Thus, an attorney against whom charges of misconduct have been made is not subject to arrest, or incarceration, or the fixing of bail or any other method of guaranteeing his appearance at time of trial. It must follow, therefore, that the requirements of due process in a disciplinary (or other license revocation) proceeding is satisfied if an attorney has been given a reasonable opportunity to be present at the hearings held with respect to the charges. Absent any means to compel the attorney's presence, to hold otherwise would mean that the charges against him could only be determined if he voluntarily appeared. A mere statement of that proposition demonstrates its irrationality.

The cases cited by petitioner are not relevant to the issue presented here.

In *Snyder* v. *Massachusetts,* 291 U. S. 97, this Court recognized that even in a criminal case, the right of the accused to be present may be lost by consent "or at times even by misconduct" (at 106). In the same opinion, the Court stated that the privilege of confrontation was particularly intended to preserve the right of the accused to cross-examine witnesses (at 107). Petitioner's right to cross-examination here was carefully preserved.

In *Willer* v. *Committee on Character and Fitness,* 373 U. S. 96, this Court reversed the denial of admission to the Bar of the State of New York where the applicant, unlike petitioner here, was not specifically informed of the "charges" upon which the refusal to admit him was predicated; was not given a hearing; and was not permitted to cross-examine his "accusers".

In *Pointer* v. *Texas*, 380 U. S. 400, this Court reversed a criminal conviction upon the ground that the introduction of a transcript of a witness' testimony taken at a preliminary hearing deprived the accused of his constitutional right to cross-examine the witness, a right afforded to, and exercised by, petitioner here.

In determining whether petitioner here was afforded a reasonable opportunity to be present at the hearing in question, one must consider the events which transpired up to that point.

Petitioner had had approximately four weeks notice that the first hearing was scheduled to be held on September 15, 1965 (Pet. Ex. 2; Min. pp. 2-4). On September 9, 1965, six days before the scheduled hearing, petitioner was advised by letter that witnesses were coming from Washington, D. C., and that "In the circumstances, you will be expected to be ready to proceed" (Pet. Ex. 3; Min. pp. 4-5). On the same day, September 9, 1965, petitioner went to trial (in the sense that one juror was sworn) in a criminal case pending in the Supreme Court of the State of New York but the commencement of the trial was itself deferred for several days (Min. pp. 12-13). Petitioner made no effort to seek an adjournment of that trial upon the ground that he was committed at the Appellate Division hearing (a court of superior jurisdiction) the following week, and, in fact, in no way advised the Trial Judge thereof. Moreover, although petitioner knew when he received the letter from counsel for respondent written on September 9, 1965, advising that witnesses were coming from Washington, D. C., that he would be unable to attend the hearing scheduled for September 15, 1965, as a result of his trial commitment, petitioner did not advise the attorney for respondent

of his intention to seek an adjournment until sometime on September 13, 1965, and subsequently failed to make a written request for an adjournment as he had represented he would. The out-of-state witnesses consequently were present on the date the hearing was scheduled, September 15, 1965.

The referee nevertheless agreed to adjourn the hearing provided, as petitioner agreed, that he would bear the expenses of having the witnesses return for the adjourned date. Thereafter, several scheduled hearing dates were cancelled because of injuries sustained by one of the witnesses for respondent which incapacitated her and prevented her from coming to New York to testify. Petitioner was notified of the scheduling of each of these dates, the first of which he had himself requested when the September 15, 1965, hearing was adjourned (Min. p. 38), and with each such communication was reminded of his undertaking to furnish the witnesess with the necessary funds for them to return to New York to attend the adjourned hearing (Pet. Ex. 42; Min. pp. 147-50). He did not do so although the present petition implies he was prepared to proceed on each of these dates which subsequently were adjourned by respondent.

On February 23, 1966, petitioner was sent a notice of a hearing to be held on March 3, 1966, containing the referee's direction to petitioner that he promptly communicate with the referee to confirm whether he had forwarded the expense monies to the witnesses in accordance with his undertaking at the hearing on September 15, 1965 (Pet. Ex. 39; Min. pp. 144-5). Petitioner never communicated with the referee as requested (Min. p. 154).

In the present petition, petitioner seeks to excuse his failure to send the witnesses the necessary funds (while

ignoring the fact that he failed to comply with the referee's direction to advise whether or not he had forwarded the funds in question) upon the ground that to do so would have been a foolish act since petitioner was engaged in the Federal trial and, therefore, could not appear at any hearing at which the witnesses could testify (Pet., p. 15). That might be an arguable position with respect to the hearing later scheduled to be held on June 9, 1966, but it cannot excuse petitioner's failure to send the witnesses money for their expenses to attend the hearings scheduled to be held October 14, 1965, December 7, 1965 and March 3, 1966 (Pet. Ex. 39; Min. pp. 144-5; Pet. Ex. 42; Min. pp. 147-150), each of which was later cancelled by counsel for respondent due to the illness of his witness and none of which could have interfered with the Federal trial which, according to petitioner himself, was not marked ready until April 26, 1966 (Pet., pp. 12-13). There could, therefore, be no other conclusion drawn from petitioner's continued failure to send the witnesses money for their expenses as he had undertaken to do or to comply with the referee's direction that he indicate whether or not he had complied with that undertaking than that petitioner was deliberately seeking to delay the hearings.

On April 7, 1966, petitioner was advised that the hearing would be held on May 4, 1966 (Pet. Ex. 40; Min. pp. 145-6). One day before that scheduled hearing, on May 3, 1966, petitioner appeared before Judge Breitel to seek an adjournment on the ground that he was then engaged in a trial in the Federal Court. At the ensuing conference, it was mutually arranged to adjourn the hearing to June 9, 1966, a date selected by petitioner (Min. p. 50), when it would be held without fail. A stipulation confirming this

agreement was forwarded to petitioner on May 5, 1966, by the attorney for respondent but petitioner failed to sign the stipulation or to advise counsel for respondent that he would not do so, thereby clearly indicating that he never had any intention of complying with the arrangement to which he had agreed.

On June 1, 1966, petitioner was notified in writing that a hearing would be held on June 9, 1966, in conformity with the agreement reached in Judge Breitel's chambers (Pet. Ex. 41; Min. pp. 146-7). This notice further advised petitioner that if he failed to honor his commitment to provide the money for the expenses of the witnesses, respondent would move to amend the charges in that regard. Upon receipt of that notice, presumably on June 2, 1966, or certainly no later than June 3, 1966, petitioner either expected to be able to proceed on June 9, 1966, or knew that he would not be able to. If he expected to be able to proceed, and was desirous of doing so as he now professes, he would have forwarded the expense monies to the witnesses. He did not do so. If, on the other hand, petitioner knew upon receipt of the notice that he could not proceed on June 9, 1966, he would have immediately contacted counsel for respondent to so inform him. He did not do that.

Petitioner, in fact, did not communicate with counsel for respondent until June 8, 1966, one day before the scheduled hearing, when he advised that he would request an adjournment. By then, counsel for respondent, not having heard from petitioner, had again forwarded expense monies to the witnesses who were on their way to New York. On June 9, 1966, the day scheduled for the hearing pursuant to the arrangement agreed upon at the conference with

Judge Breitel, the witnesses arrived prepared to testify. Petitioner appeared before the referee and requested an adjournment upon the ground that he was still on trial in the Federal Court. As on the prior occasion when petitioner sought and obtained an adjournment on the ground that he was engaged elsewhere, petitioner made no effort whatever to request a recess of the trial in Federal Court to enable him to appear in the disciplinary proceeding pending against him (despite the referee's advice on the prior occasion when petitioner was engaged in a trial that this is what petitioner should have done), even though the judge presiding had demonstrated an understanding for the personal problems of the participants in the trial, having granted recesses totaling a week to ten days for such reasons.

In passing upon petitioner's application for a further adjournment, the referee was, therefore, faced with the following facts:

1) Petitioner, having had four weeks notice of the hearing scheduled for September 15, 1965, failed to advise counsel for respondent that he would request an adjournment until September 13, 1965, although the request was predicated upon petitioner's actual engagement in a trial which had commenced on September 9, 1965, in a court of inferior jurisdiction;

2) Although petitioner had obtained an adjournment of the September 15, 1965, hearing upon the specific representation that he would undertake to forward the necessary funds to the out-of-town witnesses to enable them to appear at an adjourned date, he failed to do so although notified of hearings to be held in October 1965, December 1965 and March 1966, which petitioner presumably was prepared to attend and which ultimately had to be ad-

journed by respondent due to the illness of one of the witnesses;

3) Petitioner ignored the referee's direction to communicate with him to advise whether or not he had complied with his undertaking to furnish expense monies to the witnesses;

4) Petitioner had obtained an adjournment of a hearing scheduled for May 4, 1966, upon the ground that he was engaged in a Federal trial at which time he agreed to proceed with the hearing on June 9, 1966, a date he selected, whether or not the Federal case was concluded;

5) Although petitioner had been reminded in writing on June 1, 1966, that the hearing would be held on June 9, 1966, and was again reminded of his undertaking to furnish expense monies to the witnesses, he neither sent the monies to the witnesses nor communicated with counsel for respondent until June 8, 1966, one day before the hearing, when he must have known that the witnesses were once again on their way to testify.

In these circumstances, the referee denied petitioner's request for an adjournment, refusing to once again send the witnesses back to Washington, but reserving to petitioner the right to examine the transcript of their direct testimony, the right to object and to move to strike any testimony which he claimed was improperly taken and the right to have the witnesses recalled for cross-examination. We respectfully submit that in the circumstances presented, the referee's determination in this regard was, to say the least, a reasonable exercise of his discretion as the officer presiding at the hearing.

Since the issues of fact were to be decided solely by the referee, no jury being involved, the proposed procedure of affording petitioner the right to inspect the transcript, to object and to move to strike any testimony improperly taken, afforded him an adequate opportunity to remove from the record any allegedly improper evidence received in his absence. Despite this opportunity, petitioner did not find it necessary to examine the transcript of the witnesses' direct testimony before cross-examining them, being familiar with the substance of their testimony since he had been present when they testified at a preliminary hearing before the Committee on Grievances (Min. p. 161), and made no objection to any testimony taken. In fact, no claim is even here made that any evidence, substantial or otherwise, was improperly received during petitioner's absence. Consequently, it is clear that the determination of the charges against petitioner was in no way affected by his absence during the taking of the direct testimony of these witnesses whom he subsequently fully cross-examined.

In summary, it is respectfully submitted that petitioner was given more than adequate opportunity to be present during the testimony of the witnesses. His repeated failures to abide by agreements he had made, to give notice of requests for adjournments sufficiently in advance so that, if granted, unnecessary trips by out-of-state witnesses could be avoided, and his failure to make any effort whatsoever to obtain permission to be present at the hearings, demonstrate his bad faith. Only by insisting that the direct testimony of the witnesses be taken whether or not petitioner remained, did the referee cause the hearings to proceed. For faced with a record containing the direct testimony, petitioner thereafter proceeded in a reasonably expeditious manner.

II.

The Sixth Amendment right to a public trial is not applicable to disciplinary proceedings; the secrecy attendant to disciplinary proceedings is mandated for the protection of the accused attorney; and petitioner did not timely raise the point.

Inasmuch as a disciplinary proceeding is not a criminal case within the meaning of the Constitution, as we have previously pointed out, the requirement of public trial contained in the Sixth Amendment does not apply. Consequently, New York, like most other States, has been able to protect the accused attorney by statute and court procedure requiring that the existence of a disciplinary proceeding be kept confidential until and unless a final order sustaining charges of misconduct and imposing discipline is entered. Inasmuch as this secrecy provision is intended solely for the purpose of protecting the accused attorney, he may waive it and request public hearings. Such a request is a rare occurrence. The last time it occurred in the First Judicial Department in New York was in *Matter of Ungar,* 25 A. D. 2d 322, cert. den. 385 U. S. 1006, where the hearing was open to the public. Petitioner here not only did not request a public hearing but failed to raise the contentions now advanced in either the Appellate Division or in seeking leave to appeal the order of disbarment to the Court of Appeals of the State of New York. Consequently, petitioner may not now raise the issue, the jurisdiction of this Court not having been preserved since it does not affirmatively appear from the record that the question was presented to the State Courts, *Lynch et al.*

v. *N. Y. ex rel. Pearson*, 293 U. S. 52; *Ellis* v. *Dixon, et al., Members of the Board of Education of the City of Yonkers*, 349 U. S. 458.

CONCLUSION

The petition for a writ of certiorari should be denied.

March 22, 1968

Respectfully submitted,

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APPENDIX

Referee's Report

SUPREME COURT

APPELLATE DIVISION—FIRST JUDICIAL DEPARTMENT

In the Matter

—of—

JOHN B. SANDS,

An Attorney.

APPENDIX